

# GEORGIA EVIDENCE CODE QUICK REFERENCE GUIDE

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This guide is intended to provide a general overview and summary of the Georgia Evidence Code. The Code or an appropriate treatise should be consulted for full information on the applicable rule. Citations are to the Official Code of Georgia.

## GENERAL PROVISIONS & APPLICATION

**Evidence rules applicable to trials and proceedings generally:** The Evidence Code applies to all jury trials and all non-jury trials and fact-finding proceedings in any court except as noted below. [24-1-2(a), (b)]

**Non-application of evidence rules:** Except for rules governing privilege, the Evidence Code does not apply to the following situations: (1) a court's consideration of admissibility of evidence under 24-1-104; (2) criminal grand jury proceedings; (3) extradition or rendition proceedings; (4) probation revocation proceedings; (5) search/arrest proceedings, except as provided by 17-4-40(b); (6) bond hearings; (7) dispositional/custody hearings in juvenile court; and (8) contempt proceedings under 15-1-4. [24-1-2(c)]

**Limited application of evidence rules:** The evidence rules apply except as noted to: (1) commitment/preliminary hearings, except that hearsay is admissible; (2) in rem forfeiture proceedings, except that hearsay is admissible to deter-

mine probable/reasonable cause; (3) presentence hearings, except that hearsay and character evidence are admissible; and (4) administrative hearings, subject to special statutory or authorized agency rules. [24-1-2(d)]

**Rulings & preservation of error:** Generally, in order to preserve an allegation of error, a party must either object to admission of evidence, stating the specific ground for the objection, or make an offer of proof to place the substance of the evidence in the record and make it known to the court. The court must provide parties the opportunity to object and make offers of proof. Offers of proof should be done outside the presence of the jury. [24-1-103(a), (b), (c)]

**Plain error:** Absent a proper objection/offer of proof, a court may take notice of plain error affecting substantial rights, though such a showing imposes a very high burden. [24-1-103(d)]

**Preliminary questions of admissibility:** Questions regarding admission of evidence, witness qualification, or the existence of privilege shall be determined by the court.

The rules of evidence do not apply to these questions except those governing privilege. Such hearings should be conducted out of the jury's presence, and a criminal defendant's testimony as to a preliminary matter shall not subject him/her to cross-examination on other issues. [24-1-104(a), (b), (d)]

**Conditional admissibility:** If evidence is relevant only upon the fulfillment of a fact, it is admitted upon or subject to introduction of evidence sufficient to support fulfillment of that fact. [24-1-104(b)]

**Limited admissibility:** Evidence may be admitted subject to a limiting instruction if it is not admissible as to another party or issue. [24-1-105]

**Rule of completeness:** When a party introduces a writing, recorded statement, or admission, the adverse party may introduce any other part, or any other writing or recorded statement, which in fairness should be considered contemporaneously. [24-1-106, 24-8-822] The Civil Practice Act also provides for admission of other portions of depositions where one party presents only a portion of the testimony. [9-11-32(a)(5)]

## RELEVANCE & EXCLUSIONS

### Definition and admission of relevant evidence:

Relevant means "[h]aving any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [24-4-401] Relevant evidence is generally admissible, and irrelevant evidence inadmissible, except as provided by the Evidence Code, other rules, or Constitutional provisions. [24-4-402]

**Exclusion of certain relevant evidence:** If the probative value of relevant evidence is substantially outweighed because of the danger of unfair prejudice, confusion of the issues, or misleading the jury; or because of undue delay, waste of time, or the fact that the evidence is needlessly cumulative, it may be excluded. [24-4-403]

**Habit/routine:** Habit or routine practice (in the case of a business) is admissible to prove that conduct on a particular occasion was in conformity with the habit or practice. The action must be more than a tendency, and must be semi-automatic in nature. [24-4-406]

**Subsequent remedial measures:** Generally inadmissible to prove negligence or conduct, but may be admitted for other purposes, including impeachment or for proving ownership, control, or feasibility of precautionary measures. Subsequent remedial measures are admissible in products liability cases. [24-4-407]

**Settlement and settlement discussions:** Evidence of settlement/settlement discussions, or offers or demands, are inadmissible to prove liability or invalidity of a claim or its amount, as are conduct or statements made in such discussions, or in mediation. Such evidence may be admissible to show bias, prejudice, or for other relevant purposes. [24-4-408]

**Paying/offering to pay medical and similar expenses:** Such acts are inadmissible to prove liability. [24-4-409]

**Plea discussions:** Withdrawn guilty pleas, pleas of *nolo contendere*, and discussions leading to no plea, or a plea that is later set aside, vacated, or withdrawn are generally inadmissible. Such evidence may be admissible if made in conjunction with another statement in the same plea or discussion and it ought, in fairness, be considered. Such evidence may also be considered in proceedings for perjury or making a false statement in certain circumstances. [24-4-410]

**Liability insurance & collateral sources:** Evidence of liability insurance is generally excluded, as to a tort claim against an insured person, unless relevant for another reason such as proving agency, ownership, or control if the court finds that its probative value substantially outweighs its prejudice. Such evidence is not excluded in direct-action cases under 40-1-112. [24-4-411] Evidence of health insur-

ance or third-party payments for medical expenses and other special damages are excluded under the collateral source rule. *Denton v. Con-Way S. Exp.*, 261 Ga. 41 (1991).

**Rape-shield law:** Evidence of a victim's past sexual activity or other moral character is generally inadmissible except in cases where the past behavior involved the defendant and the court finds the evidence relevant to a defense of consent. [24-4-412]

**Apology/remorse by health care provider:** In medical malpractice cases, statements by a health care provider expressing regret, apology, error, or similar sentiments are inadmissible. [24-4-416]

**Character evidence:** Such evidence, including of prior crimes, is generally prohibited, except as otherwise provided by the Evidence Code and discussed below. [24-4-404(a)] When admissible, evidence of character may be presented based on reputation or opinion, and on cross-examination the witness testifying as to character may be questioned as to specific instances of conduct. [24-4-405(a), (b)]

**Other bad acts:** Prior/subsequent criminal acts are not admissible to show character generally. They may be admitted if otherwise relevant, including to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [24-4-404(b)]; *Olds v. State*, 299 Ga. 65 (2016).

**Character trait of defendant or victim:** A defendant may offer evidence his/her character, in which case the prosecution may offer evidence in rebuttal. A defendant may offer character evidence of an alleged victim where relevant, also subject to rebuttal. [24-4-404(a)] When a defendant testifies to his/her character, either side may inquire into specific instances of conduct. [24-4-405(b)]

**Where character is an element of claim or charge:** Where a character trait is an element of a charge or defense, proof may be made by specific instances of conduct, which may also be admitted on cross-examination. [24-4-405(b)]

**Past acts of sexual assault or child molestation:** Evidence of such acts is admissible "on any matter to which it is relevant." [24-4-413, -414] Such evidence may also be admissible in civil proceedings. [24-4-415]

**Prior DUIs:** Evidence of prior DUIs is admissible in a criminal proceeding for DUI where (1) a defendant refuses to take a blood alcohol test and claims an excuse for doing so; (2) the breath test is unable to be completed because of an inadequate sample; or (3) the identity of the defendant is in dispute. [24-4-417] Such evidence may also be admissible under 24-4-404(b).

**Evidence of criminal gang activity:** Such acts are admissible in prosecutions under 16-15-4. [24-4-418]

## DOCUMENTARY EVIDENCE

**Original or duplicate generally required:** Although the Evidence Code ostensibly requires the use of original documents [24-10-1002], it liberally allows the use of duplicates (as defined in 24-10-1001: photocopies, photographs, or similar reproductions) unless a genuine question is raised as to the original's authenticity, or the circumstances otherwise make it unfair to admit a duplicate. [24-10-1003]

**Other evidence when original or duplicate unavailable:** If an original or duplicate cannot be produced, other evidence of the contents of the document may be introduced as an exception to the Best Evidence Rule. Such evidence may be introduced where: (1) all originals are lost or destroyed, and the loss or destruction was not done in bad faith; (2) the original cannot be obtained by appropriate judicial process or procedure; (3) the party against which the document would be offered was under control of the document, was on notice that it was needed at the trial or hearing, and failed to produce the document; or (4) the document is not closely related to a controlling issue. [24-10-1004]

**Summaries:** Where admissible evidence is so voluminous such that it cannot be conveniently examined in court, a summary, chart, or calculation may be introduced, so long as other parties are allowed to examine the originals. The court may order that the full evidence be produced. [24-10-1006]

**Public records:** Duplicates of public records are permitted if authenticated under 24-9-902 or -920, or by a witness who has compared them with the original. If a duplicate cannot be reasonably obtained, other evidence of the public record is admissible. [24-10-1005]

**Testimony or admissions as to content:** A party may prove the contents of documents by the testimony, admission, or other statement of the party against which the documents are used without the necessity of producing an original or duplicate. [24-10-1007]

**Duty of judge and jury in considering documents:** Generally, admission of documents is determined by the judge, under 24-1-104. But if the issue is (1) the existence of a particular document; (2) whether another document produced is the original; or (3) whether other evidence of contents correctly reflects the contents, the duty falls on the jury. [24-10-1008]

## WITNESSES AND IMPEACHMENT

**Witnesses generally competent:** Unless otherwise provided, all persons are deemed to be competent to testify. [24-6-601]

**Judges and jurors:** Judges and jurors are not competent to testify in cases in which they are participating. [24-6-605, -606] This includes inquiries into the jury's deliberation, except that jurors may testify as to extraneous prejudicial information or improper outside influence involved in the result, or mistakes on the verdict form. [24-6-606(b)]

**Personal knowledge:** Except for experts, witnesses must testify from personal knowledge. [24-6-602] A lay witness may, however, testify to an opinion on market value and other non-expert issues. [24-7-701]

**Oath or affirmation:** Witnesses must declare that they will testify truthfully by oath or affirmation. [24-6-603] In criminal cases, the oath must substantially comply with the language provided at 17-8-52.

**Interpreters:** Interpreters must take an oath to make a true translation, and are subject to 24-7-702 governing expert witnesses. [24-6-604] The Georgia Supreme Court has promulgated extensive rules on interpreters, and 24-6-650–658 provide rules specific to interpreters for hearing-impaired individuals.

**Mode and order of testimony:** Although each party is generally allowed to present witnesses in the order desired, the court has authority to control the mode and order of testimony in order to make the interrogation effective for the ascertainment of truth, avoid waste of time, and protect witnesses from harassment and embarrassment. [24-6-611(a)]

**Court's witnesses and questioning of witnesses:** The court, with or without the request of a party, may call its own expert witness, a witness regarding a party's competency, or a child witness. Otherwise, the court may not call a witness without the consent of the parties. Court witnesses may be cross-examined by all parties. The court may also examine witnesses called by itself or any party. [24-6-614, 24-7-706]

**Cross-examination:** Parties are entitled to a thorough and sifting cross-examination of witnesses called against them. Cross-examination may be on any matter relevant to issues in the case, and is not limited to matters raised in direct examination. Multiple adverse parties with distinct interests have a right to separate cross-examination. [24-6-611(b)] Leading questions are allowed in cross-examination. [24-6-611(c)]

**Calling adverse witnesses/leading questions:** Leading questions are generally prohibited in direct examination except as necessary to develop testimony. But if a party calls a hostile witness, the adverse party, or a witness identified with an adverse party, leading questions are allowed. The party calling such a witness should announce the intent to cross-examine. [24-6-611(c)]

**Refreshing recollection:** A witness may use a writing to refresh his/her recollection during testimony, and may be cross-examined on the writing. The adverse party may also introduce relevant portions of the writing into evidence. For writings used to refresh recollection before testifying, the adverse party may seek its production, subject to statutory protections for privileged material. [24-6-612] The party presenting the testimony being refreshed cannot introduce the writing itself unless it is independently admissible.

**Sequestration/right to be present in courtroom:** Crime victims are generally entitled to be present during the prosecution of the crime. [24-6-616] Parties, a designated corporate officer, or persons whose presence is essential to a party's case are entitled to be present. This may include expert witnesses in some circumstances. Otherwise, witnesses shall be excluded from hearing the testimony of other witnesses upon request of a party. [24-6-615]

**Protection of witnesses:** Witness shall be protected from improper questions and harsh or insulting demeanor. [24-6-623]

## Impeachment

**Generally, and who may impeach:** Impeachment is the act of challenging or disproving the credibility of a witness or his/her testimony, as discussed further below. Any party may seek to impeach a witness, including the party calling the witness. [24-6-607] Credibility is always to be determined by the jury. [24-6-620]

**Religious beliefs:** Unless relevant for some other reason, the religious beliefs of a witness shall not be admitted to attack a witness's credibility. [24-6-610]

**Disproving facts:** A witness may be impeached by disproving facts testified to. [24-6-621]

**Bias:** A witness may be impeached for his/her feeling toward, or relationship with, the parties. [24-6-622]

**Evidence of witness's character and conduct:** Such evidence (e.g., the testimony of another witness) may be admitted only as to the witness's character for truthfulness or untruthfulness, and may be based on another witness's opinion or testimony of the reputation of the witness whose character is being attacked. Evidence of truthfulness may be offered only after character for truthfulness has been attacked. An impeaching witness may not testify as to specific instances relevant to the character of the attacked witness except (1) for purposes of proving a criminal conviction under 24-6-609 or bias under 24-6-622 or (2) in the court's discretion, on cross-examination. When allowed, the impeaching witness may be questioned about specific instances relevant to his/her own character for truthfulness or such instances as to the witness being attacked. In criminal cases, a witness, including the defendant, may testify as to character for truthfulness without waiving the privilege against self-incrimination. [24-6-608]

**Criminal convictions:** A witness may be impeached by evidence of conviction of (1) a felony (subject to the 24-4-403 balancing test for prejudice) or (2) any crime involving an act of dishonesty or making a false statement (not subject to the balancing test). Misdemeanor or theft charges generally do not qualify as impeachable convictions. Convictions are not admissible if more than 10 years elapsed from the later of conviction or release at the time of testimony unless the court finds by specific facts that the probative value outweighs the prejudice and written notice has been provided. A pardon based on a finding of innocence will bar use of a conviction; a pardon based on a finding of rehabilitation will bar its use if the person has not been convicted of a subsequent felony. Pendency of an appeal is admissible but will not bar use of the conviction. Nolo contendere adjudications are inadmissible, as are juvenile adjudications except in limited circumstances in criminal prosecutions. [24-6-609]

**Prior inconsistent statements:** A witness may be impeached by the witness's prior statement, written or otherwise, inconsistent with testimony. The witness need not be shown the statement, though the opposing party is entitled to see it upon request. [24-6-613] Other than an admission of a party opponent under 24-8-801(d)(2) or evidence to attack a declarant under 24-8-806, the statement itself is not admissible unless the witness is afforded an opportunity to explain or deny the prior statement and opposing counsel has the opportunity to question the witness on the statement. [24-6-613(a), (b)]

**Rehabilitation of impeached witness through prior consistent statements:** A prior consistent statement may be offered to rehabilitate a witness whose credibility has been attacked for reasons other than for character and conduct under 24-6-608 or convictions under 24-6-609. If offered to rebut a claim of recent fabrication or improper influence or motive, the prior statement must have been made before the fabrication/improper influence or motive is alleged to have occurred. [24-6-613]

## OPINION AND EXPERT EVIDENCE

**Lay testimony:** A lay witness may testify to opinions or inferences (1) rationally based on the perception of the witness; (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) not based on scientific, technical, or other specialized knowledge. [24-7-701(a)]

**Fair market value testimony:** A lay witness may testify to market value if the witness has had an opportunity to form a seasoned opinion. [24-7-701(b)]

**Expert testimony:** The federal Daubert standard applies to all cases effective July 2022. Expert opinion testimony must be based upon (1) sufficient facts or data; (2) reliable principles and methods; and (3) application of the principles and methods to the facts of the case that have been or will be admitted. [24-7-702]

**Expert testimony-malpractice:** In professional malpractice cases, an expert testifying to the defendant's standard of care must have been licensed at the time of the tort by the relevant regulatory agency. [24-7-702(c)(1)] In medical malpractice cases, additional requirements must be met, including active practice or teaching in the area of practice or specialty for three of the past five years. [24-7-702(c)(2)]

**Expert testimony-criminal (before July 2022):** Expert testimony on "science, skill, trade, or like questions shall always be admissible." [24-7-707] Admission of expert testimony requires that "the procedure or technique in

question has reached a sci-entific stage of verifiable certainty." *Jones v. State*, 299 Ga. 40 (2016); *Harper v. State*, 249 Ga. 519 (1982).

**Bases of expert opinion:** A witness may render expert opinions based on data known before or at the trial or hearing. The data need not be admissible if reasonably relied upon by experts in the field. The underlying evidence, if otherwise inadmissible, shall not be admitted solely because of the expert's reliance upon it unless the court finds its probative value outweighs its prejudicial effect. [24-7-703] The expert need not disclose the facts underlying the opinion unless required by the court, but such data may be inquired upon on cross-examination. [24-7-705]

**Court-appointed experts:** The court may appoint its own experts, with or without the recommendation or consent of the parties. The court or any party may call or cross-examine the witness. [24-7-706]

**Opinion as to ultimate issue:** Such evidence is generally admissible notwithstanding that it is a matter for determination by the finder of fact. [24-7-704(a)]

**Opinion as to criminal defendant's mental state or condition:** Such evidence as to the ultimate issue is inadmissible when offered to prove an essential element of a crime or defense. [24-7-704(b)]

## HEARSAY & ADMISSIONS

**Hearsay:** An out-of-court oral or verbal assertion, or conduct intended to be an assertion, offered to prove the truth of the matter asserted. [24-8-801(a), (c)]

**Declarant:** The declarant is the person who made the out-of-court assertion. [24-8-801(b)]

**Exclusion of hearsay:** Hearsay is generally inadmissible, but failure to object to inadmissible hearsay shall constitute a waiver. [24-8-802] However, numerous exceptions and exclusions are discussed below.

**Hearsay within hearsay:** Each layer of hearsay requires an applicable exception/exclusion. [24-8-805]

**Authentication and reliability still required:** Hearsay exceptions/exclusions still require that evidence be authenticated, and a judge may limit/exclude evidence that is prejudicial or lacking in trustworthiness.

**Evidence not prohibited by hearsay rule may remain inadmissible:** The fact that a hearsay exception/exclusion applies does not mandate admission. Evidence must otherwise be admissible as relevant evidence and may also be excluded or limited by other rules, such as for evidence of character.

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## HEARSAY & ADMISSIONS (Continued)

### Common Exclusions from Hearsay Rule

**Admissions:** Admissions of a party to a case are not hearsay when offered by an opposing party. [24-8-801(d)(2)] Admissions may be made by a representative, agent, employee, person authorized by a party to make the statement, or a co-conspirator, and may be made by a party's adoption of another's statement. Certain admissions may be excluded, such as plea or settlement discussions [24-4-408, -410], offers to pay medical expenses [24-4-409], and statements of apology by medical professionals [24-4-416].

**Effect on the listener:** "An out of court statement that is offered to show its effect on the hearer's state of mind is not hearsay." *Brown v. State*, 332 Ga. App. 635 (2015).

**Residual exception:** Evidence not otherwise subject to a hearsay exception/exclusion may be admitted, if found reliable, to prove a material fact if it is more probative than other reasonably obtainable evidence and the purpose of the evidence rules and interests of justice will be furthered by admission. The offeror must provide notice to the opposing party of the statement and the declarant's name and address. [24-8-807]

**Medical narratives:** Admissible with proper substantive and procedural foundation. [24-8-826]

### Exceptions—Declarant Availability Irrelevant

**Generally:** The statements and evidence described in this section are admissible without a showing of the declarant's unavailability.

**Present sense impression:** "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." [24-8-803(1)]

**Excited utterance:** "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." [24-8-803(2)]

**Then existing mental, emotional, or physical condition:** The declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but usually not a statement to prove a fact remembered or believed. [24-8-803(3)]

**Medical diagnosis or treatment:** Statements of present or past medical conditions, pain or sensation, symptoms, cause of injury, or similar matters if pertinent to diagnosis or treatment. [24-8-803(4)]

**Recorded recollection:** Statements on written documents reflecting information the witness once, but no longer, recalls, if the writing is shown to have been accurately made at the time it was created. The writing may be read into the record but is inadmissible as an exhibit unless offered by an opponent or subject to admission on a separate basis. [24-8-803(5)]

**Business records:** Such records require a showing that they were (A) made at or near the time of the described events; (B) made by, or from information transmitted by, one with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the statement. Certification under 24-9-902(11) or (12) may be used, subject to notice requirements. [24-8-803(6)] Opinions and diagnoses contained in such records are admissible, subject to the provisions of 24-7-701 et seq. Absence of entry of such records may be shown to prove nonexistence. [24-8-803(7)]

**Public records and vital statistics:** Records, reports, statements, or data compilations of public offices to show: (A) activities of the office; (B) matters observed under duty imposed by law to which there was a duty to report, but not matters observed by law enforcement during an investigation; or (C) in civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law. [24-8-803(8)] Records of births, fetal deaths, deaths, or marriages, if made to a public office pursuant to requirements of law. [24-8-803(9)] Absence of entry of such records may be shown to prove nonexistence. [24-8-803(10)]

**Records of religious organizations:** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship, or similar facts in a regularly kept record of a religious organization. [24-8-803(11)], and statements of fact contained in a certificate made by an authorized clergy or official, at or soon after the act, regarding a marriage, sacrament, or other ceremony. [24-8-803(12)]

**Family records:** Statements of personal/family history, Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones. [24-8-803(13)]

**Documents affecting an interest in property:** Such documents, properly recorded, as proof of the content of the original document and its execution and delivery by those who executed it. [24-8-803(14)] Statements contained in such documents, regardless of recordation, if relevant to the purpose of the document, unless dealings with the property since its making have been inconsistent with the statement. [24-8-803(15)]

**Ancient documents:** Statements in a document 20 or more years old. [24-8-803(16)]

**Market reports/commercial publications:** Market quotations, tabulations, etc. relied upon by the public or by the witness's occupation. [24-8-803(17)]

**Treatises:** On cross-examination, statements in treatises/periodicals/pamphlets concerning a science/art, if the material is deemed reliable. The text is not admissible as an exhibit. [24-8-803(18)]

**Reputation (personal/family history):** Reputation concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, marriage, ancestry, or other similar facts of personal or family history, if testified to by a relative, personal associate, or member of the community. [24-8-803(19)]

**Reputation (land boundaries/history):** Community reputation, arising before the controversy, as to boundaries/customs affecting land and reputation as to events of general history important to the community/state/nation where such lands are located. [24-8-803(20)]

**Reputation (character):** Character among associates or in the community, if otherwise allowed by applicable rules. [24-8-803(21)]

**Criminal convictions:** Evidence of a judgment or guilty plea to a felony to prove any fact essential to sustain the judgment. An appeal may be shown but shall not affect admissibility. [24-8-803(22)] The exception does not apply to non-parties in criminal cases, except for impeachment. See also 24-6-609.

**Civil judgment:** As proof of personal, family, or general history/property boundaries if essential to the prior civil judgment, if otherwise admissible by reputation as allowed above. [24-8-803(23)]

### Exceptions—Declarant Must be Unavailable

**Required showing of unavailability:** A witness is deemed unavailable if unable to testify based on (1) legal privilege; (2) refusal to testify despite court order; (3) lack of memory; (4) death or physical/mental infirmity; or (5) absence from court despite the proponent's efforts to use subpoena and other powers to procure presence or, except as to prior testimony discussed below, a deposition or testimony in other form. [24-8-804(a)]

**Prior testimony:** Prior trial or deposition testimony is admissible if the party against whom the testimony is offered, or a predecessor in interest, had an opportunity/similar motive to develop the testimony. [24-8-804(b)(1)] Depositions may also be admissible under separate grounds in civil cases under 9-11-32.

**Dying declaration:** In civil proceedings and homicide prosecutions, statements made while death was believed imminent are admissible as to the cause/circumstances of anticipated death. [24-8-804(b)(2)]

**Statements against interest:** Admissible if statement is against declarant's proprietary or pecuniary interests, or would invalidate the declarant's claim or expose him/her to civil or criminal liability. In criminal cases, the statement

requires corroborating circumstances of trustworthiness if it would expose the declarant to criminal liability. [24-8-804(b)(3)]

**Declarant's family history:** Statements concerning declarant's family history (declarant's birth, adoption, marriage, divorce, legitimacy, relationship, adoption, marriage, ancestry, etc.) are admissible despite declarant's lack of personal knowledge, as are such statements concerning another with whom the declarant is related or closely associated. [24-8-804(b)(4)]

**Statement against party procuring unavailability:** If a party engages in wrongdoing that resulted in unavailability, the declarant's statements are admissible if offered against that party. [24-8-804(b)(5)]

### Other Matters

**Child hearsay:** In cases involving sexual or physical abuse, statements of declarants under 16 may be admissible under certain circumstances. [24-8-820]

**Pleadings:** Parties may avail themselves of allegations or admissions in opponents' pleadings. [24-8-821]

**Rule of completeness:** When a portion of a statement or other evidence is admitted, an opponent is entitled to have the entirety of the evidence, to the extent reasonably connected, admitted. [24-1-106, 24-8-822, 9-11-32(a)(5)]

**Confessions:** Uncorroborated confessions are insufficient for a conviction, and all confessions are to be received "with great caution." [24-8-823] To be admissible, confessions must be voluntary and made without inducement "by the slightest hope of benefit or remotest fear of injury." [24-8-824] A confession made under a spiritual exhortation, or a promise of secrecy or collateral benefit, shall not be excluded. [24-8-825]

## AUTHENTICATION

**General requirements:** As a threshold requirement to admissibility, subject to all other applicable evidence rules, the proponent of evidence must introduce "evidence sufficient to support a finding that the matter in question is what its proponent claims." [24-9-901(a)] Authenticity may be stipulated. The Evidence Code provides a non-exclusive list of sufficient authentication, discussed below, for illustration.

**Self-authentication:** Evidence may be self-authenticating and not require presentation of further evidence at trial to show authenticity. [24-9-902]

**Subscribing witness unnecessary:** Unless provided by law, the testimony of a witness signing a document is not required to prove authenticity. [24-9-903]

### Examples of Sufficient Authentication

**Witness testimony:** A witness may testify as to the authenticity of evidence based upon the witness's knowledge. [24-9-901(b)(1)]

**Handwriting authentication by non-expert:** Must be based upon familiarity not acquired for purposes of the litigation. [24-9-901(b)(2)]

**Comparison of authenticated specimen:** An expert or the trier of fact may compare evidence with a specimen. The specimen must be provided to the opposing party at least 10 days before trial. [24-9-901(b)(3)]

**Appearance/distinctive characteristics:** "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may be sufficient. [24-9-901(b)(4)]

**Voice identification:** Voices may be authenticated through lay or expert opinion testimony where the witness has knowledge, whether first hand or through a recording, connecting the voice with the purported speaker. [24-9-901(b)(5)]

**Telephone conversations:** Upon a showing that the number called was associated with a person or business, such conversations may be authenticated by showing, for a person, that the party answering was the one called, or, for a business, that the conversation was related to business transacted over the phone. [24-9-901(b)(6)]

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## AUTHENTICATION

### Examples of Sufficient Authentication (Continued)

**Public office filings:** The proponent may prove authenticity by “[e]vidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.” [24-9-901(b)(7)]

**Documents or data compilations at least 20 years old:** Documents at least 20 years old are deemed authentic where there is no suspicion as to its authenticity and the evidence was in a place where, if authentic, it would likely be. [24-9-901(b)(8)]

**Descriptions of processes or systems:** The proponent may introduce “[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” [24-9-901(b)(9)]

### Self-authenticating Evidence

**Government documents:** Generally, except for records from a foreign country, federal, state, and local documents from Georgia and other states can be authenticated by a signature under seal. [24-9-902(1)]. Other methods are available, and Georgia state and local records may be authenticated through a certification of an appropriate public officer. [24-9-901(2), 24-9-920] Foreign documents generally require more extensive authentication that may require multiple signatures. [24-9-902(3)] A custodian of records may certify duplicates of public records in compliance with 24-9-902(1)–(3).

**Government publications and published periodicals:** “Books, pamphlets, or other publications purporting to be issued by a public office” and “[p]rinted materials purporting to be newspapers or periodicals” are self-authenticating. [24-9-902(5), (6)]

**Notarized acknowledgements:** “Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public” or other qualified officer are self-authenticating. [24-9-902(8)]

**Commercial paper:** Such documents, along with signatures thereon and documents relating thereto to the extent provided by general commercial law, are self-authenticating. [24-9-902(9)]

**Business records:** Records under the hearsay exception at 24-8-803(6) may be authenticated by a written declaration of a custodian or other qualified person meeting the same

requirements set forth in that section. Records sought to be admitted under this rule require notice to adverse parties, and opportunity to inspect the records and declaration, sufficient in advance of use to permit them to challenge the evidence. [24-9-902(11)] Records from a foreign country may be admitted, in civil cases only, under these rules, if the declaration/certification is signed in a manner that would make the signed subject to criminal penalty if false. [24-9-902(12)] Additionally, “[i]nscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin” are self-authenticating. [24-9-902(7)]

### Other Matters

**Medical bills:** In personal injury cases, the patient or person responsible for the patient’s medical expenses can lay a sufficient foundation for admission of medical expenses by testifying that such bills were incurred and received in connection with the tort giving rise to the case. [24-9-921]

**Foreign laws:** Legislative acts, and judicial and non-judicial records of other United States states, territories, or possessions are given full faith and credit in Georgia if properly authenticated. [24-9-922]

**Photographs/video and audio recordings:** Where an authenticating witness is unavailable, these items may be admitted if the court finds that they reliably demonstrate the facts for which they are offered. For photographs or recordings made by a device not under the control of an operator, such evidence may be admitted upon a showing that the date/time stamp or record was contemporaneous with the acts asserted to have occurred. These provisions are non-exclusive, however, and such documents may be authenticated by the testimony of a witness who can aver to their accuracy, or as otherwise provided by law. [24-9-923]

**Department of Public Safety and Department of Driver Services records:** Records of these agencies lawfully obtained from a Georgia Crime Information Center terminal need no further authentication. However, courts require a strict showing that the document was legally obtained from a GCIC-connected terminal, and general statements about the source without specific information will not suffice. [24-9-924]

## PRIVILEGES

**Relationship privileges:** The Evidence Code sets out a number of relationships for which communications occurring therein are excluded from evidence – husband/wife [24-5-501(a)(1); 24-5-503] (discussed below); attorney/client [24-5-501(a)(2)]; communications among grand jurors [24-5-501(a)(3)]; mental health professionals/patient and other mental health professionals [24-5-501(a)(5)–(8)]; accountant/client [24-5-501(a)(9)]; communications to a minister, priest, rabbi, or similar functionary [24-5-502].

**Work-product:** Information gathered for trial preparation purposes by a party or agent are entitled to a qualified privilege. Mental impressions are subject to a near-absolute privilege. [9-11-26]

**Husband/wife:** Georgia law provides for both a communication privilege and a testimonial privilege. Communication Privilege - Communications, including non-verbal acts, between a husband and wife are privileged, but only as to communications intended to be confidential. *Georgia Intern. Life Ins. v. Boney*, 139 Ga. App. 575 (1976). Divorce or death of a spouse does not waive the privilege for communications made during the marriage. [24-5-501(a)(1)] Testimonial privilege (criminal cases) - Husbands and wives are competent, but not compellable, to testify against one another. [24-5-503(a)]

**Exceptions to marital privileges:** Exceptions to both the communication and testimonial privileges exist for charges involving a crime against a child under 18 or a crime committed by one spouse against the other, or the other’s property. [24-5-503(b)]

**Law enforcement officers:** Officers testifying in criminal cases cannot be compelled to provide their home address. [24-5-504]

**Secrets of state and other state matters:** Such admissions and communications are deemed privileged. [24-5-501(a)(4)] Officials may invoke a privilege on matters in

which the policy and interest of the state and community require concealment. [24-5-505(c)]

**Journalists:** Journalists have a qualified privilege against disclosure of information obtained through their work, unless the person asserting the privilege is a party, or where the court finds that the statutory requirements for necessity are met. [24-5-508]

**Incrimination, infamy, disgrace, or public contempt:** Witnesses can invoke a privilege as to matters that may incriminate the witness or which may tend to bring “infamy, disgrace, or public contempt” to the witness or their family. This privilege only applies to collateral issues, however, and not matters material to the case. [24-5-505(a)]

**Forfeiture of estate:** Other than in post-judgment discovery proceedings involving a debtor, a witness cannot be compelled to testify as to matters that tend to work a forfeiture of the witness’s estate. [24-5-505(b)]

**Self-incrimination and defendant testimony in criminal cases:** In addition to the Fifth Amendment privilege, the Evidence Code provides that criminal defendants may not be compelled to testify against him/herself. Where a defendant elects to testify, examination and cross-examination shall be as provided for all witnesses, except as provided by 24-6-608 and -609. [24-5-506] Where a witness other than the defendant is compelled to testify in a criminal case, no information obtained therein shall be used directly or indirectly as evidence against that witness. [24-5-507]

**Statements to family violence shelter/sexual assault center agents:** Statements made by victims to qualified agents of a shelter or center are generally privileged, subject to necessity exceptions. [24-5-509]

**Law enforcement officer peer counseling:** Statements by officers or their immediate family members to qualified peer counselors are privileged, subject to multiple statutory exceptions. [24-5-510]

## JUDICIAL NOTICE

**Adjudicative facts:** Adjudicative facts are those that are generally known in the territorial jurisdiction, or which can be readily and accurately determined from sources deemed reliable. A court may take notice without request, and shall take notice if so requested along with sufficient evidence, with the opposing party being entitled to a hearing. Judicial notice may be taken at any time. In civil cases, a matter judicially noticed is conclusively established. In criminal cases the jury may, but is not required to, accept the fact. [24-2-201]

**Examples:** Weather, scientific/natural facts, historical facts, inflation/deflation, census data, and the intoxicating nature of drugs and alcohol. This list is non-exhaustive.

**Legislative facts:** Legislative matters judicially recognized are specifically set forth: “The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State [...] the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters...” [24-2-220]

**Local government ordinances/resolutions:** Such records, if authenticated under 24-9-902(1) or (2) or 24-9-920, are admissible. [24-2-221]



### JOHN D. HADDEN - PERSONAL INJURY - TRUCKING LITIGATION - WRONGFUL DEATH

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